



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket Nos. FWS–R6–ES–2013–0081; FWS–R6–ES–2013–0082]

[4500030113]

RIN 1018–AY95; 1018–AZ61

Endangered and Threatened Wildlife and Plants; Threatened Species Status and Designation of Critical Habitat for the *Penstemon grahamii* (Graham’s beardtongue) and *Penstemon scariosus* var. *albifluvis* (White River beardtongue)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rules; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment periods on the August 6, 2013, proposed listing determination and

the August 6, 2013, proposed designation of critical habitat for *Penstemon grahamii* (Graham's beardtongue) and *Penstemon scariosus* var. *albifluvis* (White River beardtongue) under the Endangered Species Act of 1973, as amended (Act). For the proposed listing determination, we also announce the availability of a draft conservation agreement. For the proposed designation of critical habitat for Graham's beardtongue and White River beardtongue, we also announce the availability of a draft economic analysis (DEA); draft environmental assessment (draft EA); and amended required determinations section. In addition, we request public comment on new occurrence data that have become available since the publication of the proposed rules. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rules. We also announce that we will hold a public hearing on our proposed listing and proposed designation of critical habitat for these plants (see **DATES** and **ADDRESSES**).

DATES: *Written comments:* In order to ensure full consideration of your comments, submit them by close of business on [INSERT DATE 60 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public informational session and public hearing: We will hold a public informational session from 4:30 p.m. to 6:00 p.m., followed by a public hearing from

6:30 p.m. to 8:30 p.m., on Wednesday, May 28, 2014, (see **ADDRESSES**).

ADDRESSES: *Document availability:* You may obtain copies of the listing proposed rule and the draft conservation agreement on the Internet at <http://www.regulations.gov> at Docket No. FWS–R6–ES–2013–0081, and copies of the critical habitat proposed rule and its associated DEA and draft EA on the Internet at <http://www.regulations.gov> at Docket No. FWS–R6–ES–2013–0082. All of these documents are also available on the Internet at <http://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/>, or by mail from the Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Written comments: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Submit comments on the proposed listing rule and draft conservation agreement by searching for Docket No. FWS–R6–ES–2013–0081, which is the docket number for this rulemaking. Submit comments on the critical habitat proposal and its associated DEA and draft EA by searching for Docket No. FWS–R6–ES–2013–0082, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit comments on the proposed listing and draft conservation agreement by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2013–0081; Division of Policy and Directives Management; U.S.

Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203. Submit comments on the critical habitat proposal and its associated DEA and draft EA by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2013–0082; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

Public informational session and public hearing: We will hold a public informational session and public hearing at the Uintah County Public Library, at 204 E 100 N in Vernal, Utah.

FOR FURTHER INFORMATION CONTACT: Larry Crist, Field Supervisor, U.S. Fish and Wildlife Service, Utah Ecological Services Field Office, 2369 West Orton Circle, Suite 50, West Valley City, UT 84119; telephone (801-975-3330); or facsimile (801-975-3331). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on (1) our proposed listing of Graham's beardtongue and White River beardtongue as threatened species that was published in the **Federal Register** on August 6, 2013 (78 FR 47590); (2) our proposed critical habitat designation for Graham's beardtongue and White River beardtongue that was published in the **Federal Register** on August 6, 2013 (78 FR 47832); (3) our DEA of the proposed critical habitat designation; (4) our draft EA of the proposed critical habitat designation; (5) the draft conservation agreement; (6) the amended required determinations provided in this document for the proposed critical habitat designation; and (7) new occurrence data for Graham's beardtongue and White River beardtongue. We will consider information from all interested parties. We are particularly interested in:

(1) Specific information on:

(a) The amount and distribution of Graham's beardtongue and White River beardtongue occupied and suitable habitat;

(b) Areas that are currently occupied and that contain features essential to the conservation of the species that should be included in the designation and why;

(c) What areas not currently occupied are essential for the conservation of the species and why;

(d) What may constitute “physical or biological features essential to the conservation of the species” within the geographical range currently occupied by the species;

(e) Where the “physical or biological features essential to the conservation of the species” are currently found;

(f) Information indicating how these species respond to natural and anthropogenic disturbances;

(g) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(h) Whether the new occurrence data for Graham’s beardtongue and White River beardtongue should affect the boundaries of our critical habitat designation.

(2) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on the species or its proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on Graham's beardtongue and White River beardtongue and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final critical habitat designation; in particular, we seek information on the benefits of including or excluding areas that exhibit these impacts.

(6) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(7) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(8) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(9) Information on the extent to which the description of economic impacts in the DEA is a reasonable estimate of the likely economic impacts and the description of the environmental impacts in the draft EA is complete and accurate.

(10) Whether the draft conservation agreement provides sufficient conservation measures to reduce threats to one or both species, and whether these measures are sufficiently certain to be implemented and effective.

If you submitted comments or information on the proposed rules (78 FR 47590 and 78 FR 47832) during the initial comment period from August 6, 2013, to October 7, 2013, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determinations. Our final determinations concerning listing and critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final critical habitat determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion. We may, during the development of our final listing decision, decide that either species should be listed as endangered; should be listed as threatened; or is no longer warranted for listing under the Act, in which case we would withdraw the proposed rules.

You may submit your comments and materials concerning the proposed rules, DEA, draft EA, draft conservation agreement, or new information by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will also post all hardcopy comments on <http://www.regulations.gov>. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rules, DEA, and draft EA will be available for public inspection at <http://www.regulations.gov> at Docket No. FWS– R6–ES–2013–0081 for the listing proposal and at Docket No. FWS– R6–ES–2013–0082 for the critical habitat proposal and its associated documents. All comments, materials, and supporting documentation are available by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rules, the DEA, draft EA, and draft conservation agreement on the Internet at <http://www.regulations.gov> at Docket No. FWS–R6–ES–2013–0081 for the proposed listing rule, or at Docket No.

FWS–R6–ES–2013–0082 for the proposed critical habitat rule and its associated documents, or by mail from the Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Informational Session and Public Hearing

We will hold a public informational session and public hearing on the date shown in the **DATES** section at the address shown in the **ADDRESSES** section. Registration to present oral comments on the proposed rules at the public hearing will begin at the start of the informational session. People needing reasonable accommodations in order to attend and participate in the public hearing should contact Larry Crist, Field Supervisor, Utah Ecological Services Field Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the proposed designation of critical habitat (including the DEA and draft EA) and the development of a draft conservation agreement for Graham’s beardtongue and White River beardtongue in this document. For more information on previous Federal actions concerning Graham’s beardtongue and White River beardtongue, or for more information on Graham’s beardtongue and White River beardtongue or their habitat, refer to the proposed listing

rule published in the **Federal Register** on August 6, 2013 (78 FR 47590), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R6–ES–2013–0081) or from the Utah Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On August 6, 2013, we published a proposed rule to list Graham’s beardtongue and White River beardtongue under the Act (78 FR 47590), and a proposed rule to designate critical habitat for Graham’s beardtongue and White River beardtongue (78 FR 47832). We proposed to designate 67,959 acres (ac) (27,502 hectares (ha)) of critical habitat for Graham’s beardtongue in five units located in Duchesne and Uintah Counties in Utah and Rio Blanco County in Colorado. We also proposed to designate 14,914 acres (ac) (6,036 hectares (ha)) as critical habitat for White River beardtongue in three units located in Uintah County in Utah and Rio Blanco County in Colorado. That proposal had a 60-day comment period, ending October 7, 2013. We will publish in the **Federal Register** a final listing rule or withdrawal for Graham’s beardtongue and White River beardtongue on or before August 6, 2014, and if appropriate, we will also publish a final critical habitat designation for Graham’s beardtongue and White River beardtongue.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consideration of Impacts under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider among other

factors, the additional regulatory benefits that an area would receive through the analysis under section 7 of the Act addressing the destruction or adverse modification of critical habitat as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of identifying areas containing essential features that aid in the recovery of the listed species, and any ancillary benefits triggered by existing local, State, or Federal laws as a result of the critical habitat designation.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to incentivize or result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of Graham's beardtongue and White River beardtongue, the benefits of critical habitat include public awareness of the presence of these species and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for Graham's beardtongue and White River beardtongue due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken or permitted by Federal agencies.

We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the

comment period and information about the economic impact of designation.

Accordingly, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**).

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs

of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The “with critical habitat” scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct an optional 4(b)(2) exclusion analysis.

For this designation, we developed an incremental effects memorandum (IEM, April 15, 2014) considering the probable incremental economic impacts that may result from the proposed designation of critical habitat. We used the information in our IEM to develop a screening analysis of the probable economic effects of the designation of critical habitat for Graham’s beardtongue and White River beardtongue (Industrial Economics, Inc. May 1, 2014). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes

probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are therefore unlikely to incur incremental economic impacts. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation and may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM is what we consider our DEA of the proposed critical habitat designation for Graham's beardtongue and White River beardtongue and is summarized in the narrative below.

Executive Orders 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the Executive Orders' regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. We assess to the extent practicable, the probable impacts, if sufficient data are available, to both directly and indirectly impacted entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from our proposed designation of critical habitat for

Graham's beardtongue and White River beardtongue, first we identified, in the IEM dated April 15, 2014, probable incremental impacts associated with the following categories of activities: (1) Oil and gas development (includes oil shale, tar sands, and traditional oil and gas development); (2) livestock grazing; and (3) conservation activities (specifically nonnative weed control). We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we finalize the proposed listing rule, in areas where Graham's beardtongue and White River beardtongue are present, Federal agencies already will be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect these species. If we finalize the proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process. Therefore, disproportionate impacts to any geographic area or sector would not be likely as a result of the critical habitat designation.

In our IEM, we attempted to clarify the distinction between the effects that would result from these species being listed and those attributable to the critical habitat designations (i.e., difference between the jeopardy and adverse modification standards) for Graham's beardtongue and White River beardtongue. Because the designations of critical habitat for Graham's beardtongue and White River beardtongue were proposed

concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which would result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical and biological features identified for critical habitat are the same features essential for the life requisites of the species and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to Graham's beardtongue and White River beardtongue would also likely adversely affect the essential physical and biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of the proposed designation of critical habitat.

The proposed critical habitat designation for Graham's beardtongue includes the Sand Wash, Seep Ridge, Evacuation Creek, White River, and Raven Ridge units (Table 1), all five of which are occupied by the species.

Table 1. Acreage and land ownership status for the proposed critical habitat units for Graham's beardtongue. Area estimates reflect all land within critical habitat unit boundaries. BLM is Bureau of Land Management.

Critical Habitat Unit	Land Ownership	Size of Unit
1. Sand Wash	BLM	3,056 ha (7,550 ac)
	State	27 ha (66 ac)
	Private	76 ha (189 ac)
	Total	3,159 ha (7,805 ac)
2. Seep Ridge	BLM	6,649 ha (16,430 ac)
	State	2,650 ha (6,549 ac)
	Private	862 ha (2,131 ac)
	Total	10,162 ha (25,110 ac)
3. Evacuation Creek	BLM	3,879 ha (9,586 ac)
	State	1,417 ha (3,502 ac)
	Private	1,632 ha (4,033 ac)
	Total	6,929 ha (17,122 ac)
4. White River	BLM	2,243 ha (5,542 ac)
	State	401 ha (991 ac)
	Private	2,047 ha (5,059 ac)
	Total	4,691 ha (11,592 ac)
5. Raven Ridge	BLM	2,257 ha (5,578 ac)
	Private	304 ha (752 ac)
	Total	2,562 ha (6,330 ac)
Total Across All Units	BLM	18,084 ha (44,686 ac)
	State	4,495 ha (11,108 ac)
	Private	4,921 ha (12,164 ac)
	Total	27,502 ha (67,959 ac)

Note: Area sizes may not sum due to rounding.

The proposed critical habitat designation for White River beardtongue includes

the North Evacuation Creek, Weaver Ridge, and South Raven Ridge units (Table 2), all three of which are occupied by the species.

Table 2. Acreage and land ownership status for the proposed critical habitat units for White River beardtongue. Area estimates reflect all land within critical habitat unit boundaries.

Critical Habitat Unit	Land Ownership	Size of Unit
1. North Evacuation Creek	BLM	1,368 ha (3,382 ac)
	State	185 ha (457 ac)
	Private	1,415 ha (3,498 ac)
	Total	2,969 ha (7,336 ac)
2. Weaver Ridge	BLM	788 ha (1,946 ac)
	State	651 ha (1,608 ac)
	Private	1,397 ha (3,452 ac)
	Total	2,836 ha (7,006 ac)
3. South Raven Ridge	BLM	191 ha (472 ac)
	Private	41 ha (101 ac)
	Total	232 ha (573 ac)
Total Across All Units	BLM	2,347 ha (5,800 ac)
	State	836 ha (2,065 ac)
	Private	2,853 ha (7,051 ac)
	Total	6,036 ha (14,914 ac)

All proposed critical habitat units are occupied by the species. For the purposes of section 7 consultations, the areas of critical habitat within the consultation buffer are considered occupied, while the areas outside of the consultation buffer but within the

ecologically important pollinator buffer are considered unoccupied. Without critical habitat, the Service would not require formal consultation or conservation measures within the pollinator buffer. In the draft economic screening memorandum, the pollinator buffer was analyzed separately from the consultation buffer to determine the incremental costs of critical habitat. The incremental costs within the consultation buffer are expected to consist of minor administrative costs associated with addressing critical habitat in consultation documents. Within the consultation buffer, any actions that may affect the species or its habitat would also affect designated critical habitat and it is unlikely that any additional conservation efforts would be recommended in addition to those necessary to avoid jeopardizing the continued existence of Graham's beardtongue and White River beardtongue. While this additional analysis within the consultation buffer will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant. However, for projects within the pollinator buffer, the incremental cost of critical habitat would include the full costs of the formal consultation and conservation efforts. Within the pollinator buffer, the recommended conservation efforts would be additional to what would be recommended as necessary to avoid jeopardizing the continued existence of Graham's beardtongue and White River beardtongue. A summary of recommended conservation efforts is provided in the screening analysis (Industrial Economics, Inc. May 1, 2014).

The entities most likely to incur incremental costs are parties to section 7 consultations, including Federal action agencies and, in some cases, third parties, most frequently State agencies or municipalities. Activities we expect would be subject to consultations that may involve private entities as third parties are related to energy development, primarily oil shale development, that may occur on State or private lands. The incremental costs associated with activities occurring within the consultation buffer are expected to be relatively minor (administrative costs of less than \$10,000 per consultation effort); however, for activities occurring within the pollinator buffer, the incremental costs include the section 7 consultation and additional conservation efforts. The total quantifiable section 7 costs for energy development (traditional oil and gas, oil shale, and tar sands) and grazing activities associated with the proposed critical habitat designation are estimated to be \$2,900,000 (2013 dollars) in a single year. The incremental cost associated with grazing activities is a relatively minor component of the total cost (\$9,000); the major component of the total cost is associated with energy development activities. In summary, the draft economic screening memorandum concludes that future probable economic impacts are not likely to exceed \$100 million in any given year.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rules and our amended required determinations. We may revise the proposed rules or supporting documents to incorporate or address information we receive during the public comment period. In

particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of the Graham's beardtongue or White River beardtongue.

Draft Conservation Agreement

We have worked with key federal and non-federal landowners to develop a draft conservation agreement intended to provide for the conservation of Graham's beardtongue and White River beardtongue. This 15-year conservation agreement was developed in early 2014 with the BLM Utah State Office, BLM Utah Vernal Field Office, BLM White River Field Office, State of Utah School and Institutional Trust Lands Administration (SITLA), Utah Public Lands Policy Coordination Office, and Uintah County, Utah. The draft agreement outlines detailed and specific conservation measures that will be enacted throughout the range of each species to address the threats that were identified in our August 6, 2013, proposed listing rule (78 FR 47590). The draft agreement is a new agreement and not an amendment to the 2007 conservation agreement for Graham's beardtongue, as described in the proposed rule (August 6, 2013, 78 FR 47832).

The draft conservation agreement provides conservation benefits to Graham's beardtongue by protecting 64 percent of the total population, and to White River beardtongue by protecting 76 percent of the total population. Conservation measures set

forth in the agreement address threats to both species from energy development (traditional oil and gas, oil shale, and tar sands) and the cumulative effect of increased energy development, livestock grazing, invasive weeds, small population sizes, and climate change. In summary, the range of each species on Federal, State, and private lands is divided into conservation areas—totaling 44,373 acres for Graham’s and White River beardtongue. Within these conservation areas, new and permanent surface disturbance is limited to a 5-percent and 2.5-percent disturbance cap, respectively. Additionally, surface disturbance will be avoided within 300 feet of plants. If federal land within a conservation area is transferred to the State of Utah, the State will maintain the land as a designated conservation area. On federal lands outside of conservation areas, surface disturbance will be sited to avoid plants by 300 feet. To address livestock grazing impacts, a livestock monitoring plan will be developed and implemented within 1 year of the signed agreement date; the livestock monitoring plan will identify impacts for which management actions are necessary. To address invasive weeds, a weed management plan will be developed and implemented within 1 year of the signed agreement date. To address small population size, conservation areas limit disturbance to protect against habitat fragmentation and maintain population connectivity. To address climate change, weather monitoring equipment will be installed near long-term population monitoring sites to determine basic species responses to climate patterns. In an attempt to restore both species to reclaimed sites within their ranges, a restoration study will be implemented to assess the success of seedling recruitment, plant establishment, and population trend on restored sites. The development and

implementation of all of these plans and studies will be funded and supervised by the conservation team identified in the draft conservation agreement.

We intend to consider this conservation agreement once it has been signed in our final decisions on whether to list Graham's beardtongue and White River beardtongue under the Act, and invite the public to comment on the agreement and its impact on the conservation of these species, and whether the draft agreement sufficiently ameliorates the threats to Graham's beardtongue and White River beardtongue. We intend to evaluate this agreement under our Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE policy) (68 FR 15100, March 28, 2003). The draft conservation agreement is available at <http://www.regulations.gov> at Docket No. FWS–R6–ES–2013–0081 and at <http://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/>.

New Survey Information

Since the publication of the proposed rules, we have received additional survey information for Graham's beardtongue and White River beardtongue. Survey information was provided to us with location and, in some instances, plant abundance information. For Graham's beardtongue, we now know of an additional 8,631 plants, with 5,814 falling outside of our proposed critical habitat. For White River beardtongue, a total of 792 additional plants were documented, of which 276 are located outside of our

proposed critical habitat. Maps of additional plant locations are available at <http://www.regulations.gov> at Docket No. FWS–R6–ES–2013–0081 and at <http://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/>. We request the public review these data and provide comment on whether and how they should be considered for the designation of critical habitat, and how this information might impact our assessment of the species status under the Act.

Required Determinations—Amended

In our August 6, 2013, proposed critical habitat rule (78 FR 47832), we indicated that we would defer our determination of compliance with several statutes and executive orders until we had evaluated the probable effects on landowners and stakeholders and the resulting probable economic impacts of the designation. Following our evaluation of the probable incremental economic impacts resulting from the designation of critical habitat for Graham’s beardtongue and White River beardtongue, we have amended or affirmed our determinations below. Specifically, we affirm the information in our proposed rule concerning Executive Orders (E.O.s) 12866 and 13563 (Regulatory Planning and Review), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). However, based on our evaluation of the probable incremental economic impacts of the proposed designation of critical habitat for Graham’s beardtongue and White River beardtongue, we are amending our required

determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), E.O. 12630 (Takings), E.O. 13211 (Energy, Supply, Distribution, or Use), and the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951). See below for more information on these determinations.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental

jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

The Service’s current understanding of the requirements under the RFA, as amended, and following court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and therefore, not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the Agency is not likely to adversely modify critical habitat. Therefore, under these circumstances only Federal action agencies are directly subject to the specific regulatory

requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. Moreover, Federal agencies are not small entities. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that, if promulgated, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

When the range of a species includes States within the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, pursuant to that court's ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we will complete an analysis under the National Environmental Policy Act of

1969 (42 U.S.C. 4321 *et seq.*) (NEPA) on critical habitat designations. The ranges of Graham's beardtongue and White River beardtongue are entirely within the States of Utah and Colorado, which are within the Tenth Circuit.

The draft EA presents the purpose of and need for critical habitat designation; the proposed action and alternatives; and an evaluation of the direct, indirect, and cumulative effects of the alternatives under the requirements of NEPA as implemented by the Council on Environmental Quality regulations (40 CFR 1500 *et seq.*) and according to the Department of the Interior's NEPA procedures.

We will use the draft EA to decide whether or not critical habitat will be designated as proposed; if the proposed action requires refinement, or if another alternative is appropriate; or if further analyses are needed through preparation of an environmental impact statement. If the proposed action is selected as described (or is changed minimally) and no impacts will be significant, then a finding of no significant impact (FONSI) would be the appropriate conclusion of this process. We are seeking data and comments from the public on the draft EA, which is available at <http://www.regulations.gov> at Docket No. FWS-R6-ES-2013-0082 and at <http://www.fws.gov/mountain-prairie/species/plants/2utahbeardtongues/>.

E.O. 12630 (Takings)

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Graham's beardtongue and White River beardtongue in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding or assistance, or that require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The economic analysis found that no significant economic impacts are likely to result from the designation of critical habitat for Graham's beardtongue and White River beardtongue. Because the Act's critical habitat protection requirements apply only to Federal agency actions, few conflicts between critical habitat and private property rights should result from this designation. Based on information contained in the draft economic analysis, it is not likely that economic impacts to a property owner would be of a sufficient magnitude to support a takings action. Therefore, the takings implications assessment concludes that this designation of critical habitat for Graham's beardtongue and White River beardtongue does not pose significant takings implications for lands within or affected by the designation.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Graham's beardtongue and White River beardtongue both occur in areas with energy development activity. Existing well pads and proposed oil shale and tar sands development projects are within proposed critical habitat units. On Federal lands, entities conducting energy-related activities would need to consult within areas designated as critical habitat. As stated in the **Consideration of Economic Impacts** section, above, we do not anticipate additional conservation efforts related to oil and gas beyond those requested to avoid jeopardy to the species within occupied beardtongue habitat, which comprises the majority of the area proposed as critical habitat. Incremental effects of the proposed critical habitat designation are assumed to occur for energy projects in the pollinator buffer of proposed critical habitat. As of January 2014, 88 and 21 producing or newly permitted wells are located within proposed critical habitat for Graham's beardtongue and White River beardtongue, respectively. Within the pollinator buffer of proposed critical habitat, there are 75 and 16 producing or newly permitted wells for Graham's beardtongue and White River beardtongue, respectively. The number of wells within the proposed designation represents less than 1 percent of wells in the States of Utah and Colorado. We do not anticipate that the designation of critical habitat would result in significant impacts to the energy industry on a national scale. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We determined that there are no tribal lands that are occupied by Graham's beardtongue or White River beardtongue and that contain the features essential for conservation of the species, and no tribal lands unoccupied by Graham's beardtongue or White River beardtongue that are essential for the conservation of these species. Therefore, we are not proposing to designate critical habitat for Graham's beardtongue or White River beardtongue on tribal lands. However, tribal lands belonging to the Ute Tribe do occur adjacent to proposed critical habitat, and a recently developed suitable habitat model for both beardtongues indicates suitable habitat exists within the

Reservation boundary. Since December of 2013, the Service has been in communication with the Ute Tribe regarding the proposed listing and critical habitat designation, and the Service will conduct government-to-government consultation with the Ute Tribe throughout the development of the final rules.

Authors

The primary authors of this notice are the staff members of the Utah Ecological Services Field Office, Region 6, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 29, 2014.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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